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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BURTON D. LINNE, JACK O. SLATER,
and JOHN C. IMLAY, IV,

Petitioners,

v.

JAMES T. RIDEOUTTE, JOHN M. CONROY,
THOMAS D. BLONDIN, ROBERT W. ROSEN,
and STANLEY F. KRYSA,

Respondents.

**Petition for a writ of certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI and APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Where an investigator for the federal government aids and abets federal prosecutors to procure a false indictment of petitioners, obstruct justice, and suppress exculpatory evidence in ways other than by giving false testimony as a witness in petitioners' criminal trial, is the investigator entitled to *absolute* immunity from petitioners' claim for damages under *Carey* v. *Piphus*, 435 U.S. 247 (1978), and *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), simply because he may have absolute immunity for perjury he committed as a witness in furtherance of the conspiracy and the prosecutors may have absolute immunity for all actions they took under color of their prosecutorial functions?

II. Are the investigator and the prosecutors entitled to *absolute* immunity from petitioners' claim for damages under *Carey* and *Bivens* for the formers' participation in a *post*-trial "cover-up" of their procurement of a false indictment, obstruction of justice, and suppression of exculpatory evidence, where they acted neither as a witness nor as prosecutors, but in their administrative capacities, to deceive their superiors in the governmental chain of command and other independent officials about their conspiracy?

III. Even if the investigator and the prosecutors are entitled to absolute immunity from *damages* for procuring a false indictment, obstructing justice, and suppressing exculpatory evidence, should they also be shielded from *declaratory* and *injunctive* relief, even though, on appeal of petitioners' criminal convictions, the court of appeals both refused to allow petitioners to raise the issue of Grand-Jury tampering and held that the suppressed exculpatory evidence was "not material" to the convictions?

IV. Even if the investigator and the prosecutors are entitled to absolute immunity from damages for their perjury, subornation of perjury, obstruction of justice, and suppression of exculpatory evidence *in court*, do they enjoy such immunity for their *extra*-judicial conspiracy?

V. Are the investigator and the prosecutors entitled to absolute immunity under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, for jointly engaging in a "pattern" of mail fraud and obstruction of justice in connexion with the prosecution of petitioners?

PARTIES TO THIS PROCEEDING

The caption of this petition lists all parties who appeared in the Court of Appeals for the District of Columbia Circuit, the court the judgment of which is here for review.

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INTRODUCTION

Pursuant to Part III of the Rules of this Court, Burton D. Linne, Jack O. Slater, and John C. Imlay, IV (hereinafter collectively styled "Linne") hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The order of the Court of Appeals of which Linne seeks review is unreported, and appears in the appendix hereto ("Pet. App.") at 1a. The subsequent orders of the Court of Appeals denying Linne's petition for rehearing and for rehearing *en banc* are unreported, and appear in Pet. App. at 17a and 18a, respectively. The opinion of the District Court is unreported, and appears in Pet. App. at 3a.

JURISDICTION

The Court of Appeals denied Linne's petition for rehearing and for rehearing *en banc* on 16 September 1992. Pet. App. at 17a-18a. The instant petition is thus timely under this Court's Rules 13.1 and 13.4.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves application of: (i) the Due Process Clause of the Fifth Amendment to the Constitution of the United States, which provides (in pertinent part) that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law"; and (ii) the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[1] the pertinent text of which appears in Pet. App. at 19a.

STATEMENT OF THE CASE

At issue here is the Court of Appeals' radical overextension of the doctrine of "absolute immunity" so as to license governmental officials to deny Linne's basic rights of procedural due process through a web of lies: specifically, respondents' conspiracy

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[1] 18 U.S.C. §§ 1961 *et seq.*

to fabricate evidence, fraudulently suppress exculpatory evidence, commit perjury and subornation of perjury, commit mail fraud, obstruct justice, and cover up their wrongdoing before, during, and after a federal criminal prosecution of Linne.[2]

Linne was the subject of a Grand-Jury probe during 1984 and 1985. After searching out Linne's alleged connexion to the so-called "Bullion Fund", a precious-metals and currency fund located in The Bahamas, respondent James Rideoutte (acting as an Internal Revenue Service investigator) prepared a memorandum (the "Rideoutte Report") — dated 14 August 1985, but illegally suppressed until 2 June 1987 — wherein he detailed the corporate organization and operation of the Bullion Fund, identified its true principal (one Gordon Briggs), *and admitted that "[n]either the [Bahamian] police, the Central Bank, nor anyone I spoke with knew anything about" Linne.*[3] Notwithstanding this exculpatory report, on 16 October 1985 respondents Thomas Blondin and John Conroy (acting as prosecutors) procured an indictment in *United States* v. *Linne*[4], falsely charging (among other things) that Linne "establish[ed]", "formed, directed, and operated * * * the Bullion Fund" as part of an allegedly fraudulent scheme conducted in connexion with Linne's

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[2] The facts recited below are detailed in Linne's Complaint, and exhaustively documented in Plaintiffs' Statement of Material Facts Not in Dispute, in Support of Their Motion for Interlocutory Summary Judgment on the Issue of Defendants' Liability Under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Civil Action No. 89-1005 TFH (D.D.C.)("PSMF"), a copy of which (*minus* attachments) was appended as Exhibit A to Appellants' Opposition to Appellees' Motion for Summary Affirmance, Linne v. Rideoutte, No. 91-5338 (D.C. Cir.).

[3] PSMF, *ante* note 2, ¶¶ 1-4 (emphasis supplied).

[4] Criminal No. 85-00223-A (E.D. Va.)(hereinafter styled "the criminal case").

domestic program "Citizens for Dollars".[5] Moreover, in support of a motion for letters rogatory in the criminal case, Blondin and Conroy supplied a letter from respondent Stanley Krysa (the supervisor of Blondon, Conroy, and their immediate superior, respondent Robert Rosen) to the Attorney General of Bermuda (the "Krysa Letter"), dated 8 November 1985, stating that "[t]he U.S. Government intends to prove at trial that * * * [Linne] set up the Bullion Fund" — a "proof" that Krysa knew, from the Rideoutte Report at a minimum, was impossible, unless obtained through fraud.[6]

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[5] PSMF, *ante* note 2, ¶¶ 5-12. The indictment did not even mention the true principal of the Fund, Gordon Briggs — although the Rideoutte Report explicitly recited that

- "[Anthony] Thompson[, a Bahamian attorney] * * * was contacted by Gordon Briggs in late 1983 about forming a company and establishing a bank account to handle a precious metals fund";
- "Thompson was to manage the operation locally under Briggs direction";
- "[a]ccording to Thompson, * * * the principal was Briggs";
- "[Thompson] said that is Briggs had any partners, etc. they were unknown to him"; and
- "[a]ll disbursements and actions of any consequence were directed by Briggs".

Id. ¶ 4.

[6] *Id.* ¶¶ 13-26.

Prior to the criminal trial — in violation of their own agreement and the District Court's order to produce discovery, *Brady*[7], and Jencks-Act[8] materials — Blondin and Conroy wrongfully suppressed the Rideoutte Report[9] through various acts of mail fraud and obstruction of justice that constituted "predicate acts" for Linne's later RICO claim.[10]

At the criminal trial, Rideoutte (acting as a witness) falsely testified that he had been unable to discover anything substantive about the Bullion Fund in The Bahamas.[11] Conroy (acting as a prosecutor) then argued to the Petit Jury that Rideoutte's testimony "proved" that the Bullion Fund was merely an offshore "mail drop" linked to "Citizens for Dollars", and that "Linne demonstrates [his] intent [to defraud] through his promotion of the Bullion Fund". "Mr. Rideout couldn't find the principals [of the Bullion Fund]", Conroy lied. "I submit to you [jurors] that the Bullion Fund was nothing but a coverup to conceal the money and assets of the participants of Citizens for Dollars, all the while taking care of Mr. Linne."[12] So gulled, the jury convicted Linne.

After the criminal trial, respondents and others covered up the formers' obstruction of justice in the Grand Jury, mail fraud, and suppression of the Rideoutte Report, and Rideoutte's false

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[7] Brady v. Maryland, 373 U.S. 83 (1963).

[8] 18 U.S.C. § 3500.

[9] PSMF, *ante* note 2, ¶¶ 27-67.

[10] *Id.* ¶¶ 11-16, 18-19, 23-25, 36-41, 43-45, 47-52, 54-56, 58-62, 64-66.

[11] *Id.* ¶¶ 68-121.

[12] *Id.* ¶¶ 122-50.

testimony,[13] until the Court of Appeals for the Fourth Circuit ordered the Report produced to Linne on appeal of the criminal case.[14] And even then, respondents and their accomplices in the Department of Justice produced only the Report itself, suppressing key "attachments" to which the Report referred.

On appeal of the criminal case, the Fourth Circuit held that Linne's trial defense-counsel had "waived" Linne's Jencks-Act right to the Rideoutte Report,[15] and that in any event the Report "was *not material* to the question of [Linne's] intent to

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[13] *Id.* ¶¶ 151-61; *and see* Affidavit of Edwin Vieira, Jr., In Support of Plaintiffs' Motion for a Continuance Under Federal Rule of Civil Procedure 56(f), Linne v. Rideoutte, Civil Action No. 89-1005 TFH (D.D.C.), documenting Linne's later extensive, but unsuccessful attempts to gather evidence and obtain assistance from the Department of Justice and the Internal Revenue Service.

[14] Order of 1 June 1987, United States v. Linne, Nos. 86-5018L, 86-5019, 86-5020, & 86-6782 (4th Cir.). An appellate attorney for the Department of Justice handed over the Report on 2 June 1987.

[15] The court was simply confused, factually, as to this purported "waiver". The court argued that, "[a]lthough aware that [Rideoutte] was testifying from notes he had prepared, defense counsel failed to make any request to review them and therefore waived any Jencks Act complaint". United States v. Linne, Nos. 86-5018L, 86-5019, 86-5020, & 86-6782 (4th Cir.), Unpublished Slip Opinion at 7 (footnote omitted), *attached as* Exhibit B to Appellees' Motion for Summary Affirmance, Linne v. Rideoutte, No. 91-5338 (D.C. Cir.). In fact, the "notes" Rideoutte held in his hands during his testimony were *not* the Rideoutte Report, but some *other* document. *See* Affidavit of Burton D. Linne, Regarding the "Notes" Defendant Rideoutte Had in his Possession During his Testimony in *United States* v. *Linne*, Linne v. Rideoutte, Civil Action No. 89-1005 TFH (D.D.C.).

defraud".[16] The court did *not* rule, however, that the indictment was not the product of fraud — instead, without explanation, refusing to allow Linne to raise the new issue of Grand-Jury tamp ering after disclosure of the Report showed that the allegations in the indictment concerning the Bullion Fund were false.[17] Neither did the court rule that respondents had not suppressed the Report, that Rideoutte had not committed and the other respondents suborned perjury, that respondents had not covered up Rideoutte's perjury and their fabrication and suppression of evidence, and that respondents had not committed mail fraud and obstruction of justice with respect to the Bullion-Fund issue.

Linne then brought the civil action underlying this petition, praying for a declaratory judgment, injunctive relief, and damages under the First and Fifth Amendments and RICO, seeking to establish *inter alia* that:

- Notwithstanding the propriety *vel non* of the criminal convictions on other grounds, respondents' actions with respect to the Rideoutte Report violated Linne's "absolute" right to due process under *Carey* v. *Piphus*[18] and *Bivens* v.

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[16] Slip Op., *ante* note 15, at 7-8. By logical extension, the court implicitly concluded that the true relationship of the Bullion Fund to Linne's program "Citizens for Dollars" was "not material" to Linne's conviction, as the Rideoutte Report was indisputably the key evidence establishing that *lack* of relationship.

[17] Order of 20 July 1987, United States v. Linne, Nos. 86-5018L, 86-5019, 86-5020, & 86-6782 (4th Cir.).

[18] 435 U.S. 247 (1978). This right is "*absolute*" "in the sense that it does not depend upon the merits of [Linne's] substantive assertions" in the criminal case, and "because of the importance to organized society that procedural due process be observed". *Id.* at 266.

Six Unknown Named Agents of the Federal Bureau of Narcotics[19], and constituted violations of RICO.[20]

◆ Contrary to respondents' lies to the Grand and Petit Juries and the courts in the criminal case, Linne did not "establish[ ]", "form[ ], direct[ ], and operate[ ]" or "set up" the Bullion Fund.[21]

◆ Linne's new venture, the "Strict Accounting System", is unconnected to the Linne's old program, "Citizens for Dollars", that respondents had falsely tied to the Bullion Fund in the criminal case. And,

◆ Respondents should be enjoined from maintaining that the "Strict Accounting System" is the equivalent of "Citizens for Dollars", or has any past or on-going relationship with the Bullion Fund.[22]

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[19] 403 U.S. 388 (1971).

[20] Complaint ¶¶ 61-73.

[21] Establishing this fact was, and remains, particularly consequential to Linne, because, shortly after his conviction in 1985, the Bullion Fund was exposed as a "Ponzi" scheme in which numerous investors lost substantial sums. The true principal of the Bullion Fund, Gordon Briggs, has disappeared.

[22] In the courts below, respondents pretended that the last two points are Linne's attempt to relitigate the criminal appeal and a prior civil action before the District Court. The alleged linkage is counterfactual: (i) "Citizens for Dollars" and the "Strict Accounting System" are distinct programs, so that any ruling in the criminal appeal with respect to the former has no bearing on the legality or economic validity of the latter. *See* Affidavit of Burton D. Linne, In Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss, Regarding the Purpose and Theory of the "Strict Accounting System", Linne v. Rideoutte, Civil Action No. 89-1005 TFH (D.D.C.). (ii) The legality

Respondents moved to dismiss. Linne moved for interlocutory summary judgment on the issue of violation of his right to procedural due process, supplying numerous affidavits in support of his motion. The District Court treated respondents' motion as one for summary judgment.[23] Respondents then "request[ed] leave of the court to defer responding to th[e] statements [of material facts Linne filed in support of his motion for interlocutory summary judgment] in the detailed fashion required by Local Rule 108(h)".[24] But the District Court allowed no such "leave".

Thus, the District Court faced an *uncontradicted* recitation[25] of how before, during, and after the criminal trial respondents conspired to and engaged in repeated acts constituting obstruction of justice, perjury and subornation of perjury, false statements to federal officials, suppression of evidence, mail

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vel non of the "Strict Accounting System" is ***NOT*** an issue in this case, only its lack of connexion to the Bullion Fund. In the earlier civil case, where the legality of the "Strict Accounting System" was raised, the courts dismissed the action on jurisdictional grounds under color of the exception for "Federal taxes" in 28 U.S.C. § 2201, and never reached the merits. *See* Linne v. Baker, No. 85-03713 (D.C. Cir.), Unpublished Slip Op. at 2, *attached as* Exhibit D to Appellees' Motion for Summary Affirmance, Linne v. Rideoutte, No. 91-5338 (D.C. Cir.).

[23] Order of 10 December 1990, Linne v. Rideoutte, Civil Action No. 89-1005 TFH (D.D.C.).

[24] Defendants' Opposition To Plaintiffs' Motion For Interlocutory Summary Judgment, Linne v. Rideoutte, Civil Action No. 89-1005 TFH (D.D.C.), at 2.

[25] Respondents never filed any answer, affidavit, or other purported evidence of any kind in support of their claimed "immunity" or innocence.

fraud, and other forms of criminality.[26] As governmental officials involved in the criminal prosecution, Linne argued, respondents had judicially enforceable constitutional and statutory duties to afford Linne due process[27] and to refrain from RICO violations. However, respondents refused to fulfill these duties:

> ◆ They procured an indictment containing allegations about the Bullion Fund they *knew* were false in light of the Rideoutte Report.[28] Moreover, the Krysa Letter admits that Linne's supposed, but falsely portrayed, connexion with the Bullion Fund "enabled us [*i.e.*, respondents] to bring [the] indictment" at all![29] Inasmuch as the Grand Jurors did not themselves concoct from thin air the false allegations concerning the Bullion Fund, but must have relied on fake "evidence" respondents presented, the indictment alone proves that respondents obstructed justice, made false statements to government officials, suppressed evidence, and probably committed perjury, suborned perjury, or both.[30]

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[26] 18 U.S.C. § 1503 (obstruction of justice); 18 U.S.C. §§ 1621-22 (perjury and subornation); 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 2-3 (aiding and abetting); 18 U.S.C. § 4 (misprision of felony); 18 U.S.C. § 241 (violation of civil rights).

[27] *Compare* Davis v. Passman, 442 U.S. 228 (1978), *and* Walker v. Jones, 733 F.2d 923 (D.C. Cir. 1984), *with* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)(right of action under the Constitution for violation of Fifth Amendment).

[28] PSMF, *ante* note 2, ¶¶ 1-12.

[29] *Id.* ¶¶ 13-14.

[30] *Id.* ¶¶ 21-26. *See, e.g.,* Department of Justice Manual, Title 9, Chapter 11, § 9-11.233: "[W]hen a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly

◆ As the Krysa Letter evidences, respondents schemed "to prove at trial that [Linne] set up the Bullion Fund", knowing through the Rideoutte Report alone the falsity of any such "proof".[31] Thus, the Krysa Letter evidences mail fraud and establishes respondents' intent to obstruct justice, suppress evidence, make false statements to government officials, and commit and suborn perjury.[32]

◆ As the *pre*-trial proceedings in the criminal case showed, respondents' scheme "to prove at trial that [Linne] set up the Bullion Fund" hinged on and was accomplished through suppression of the Rideoutte Report by mail fraud, as the secret foundation for Rideoutte's later perjury.[33]

◆ Rideoutte's perjury was essential to the conspiracy.[34]

◆ The summations to the Petit Jury by Blondin and Conroy constituted further incidents of obstruction of justice, suppression of evidence, and reliance on knowingly perjured testimony.[35]

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negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."

[31] PSMF, *ante* note 2, ¶¶ 13-15.

[32] *Id.* ¶¶ 16-26.

[33] *Id.* ¶¶ 27-67.

[34] *Id.* ¶¶ 68-121.

[35] *Id.* ¶¶ 122-50.

- Finally, respondents' *post*-trial cover-up of Rideoutte's perjury, their suppression of the Rideoutte Report, and other *post*-appeal cover-ups amount to further evidence of the conspiracy.[36]

Yet, notwithstanding this utterly one-sided presentation of evidence, the District Court granted respondents summary judgment anyway.[37]

Linne appealed. The Court of Appeals summarily affirmed, saying simply that Linne's

> claims for damages are barred by the absolute immunity enjoyed by prosecutors and witnesses. * * * [Linne's] allegations of conspiracy do not defeat this immunity. * * * Further, we reject [Linne's] unsupported assertion that Congress, in enacting 18 U.S.C. § 1964, intended to abrogate existing immunities protecting government officials and witnesses from civil damage claims. * * * Finally, the district court properly exercised its discretion * * * to deny relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. The proper vehicles for [Linne's] challenge to the truthfulness of the government's evidence supporting th[e] convictions [in the criminal case] are direct appeal and collateral review of those convictions.[38]

The court then denied Linne's petition for rehearing and rehearing *en banc*, without opinion.[39]

This petition followed.

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[36] *Id.* ¶¶ 151-62.

[37] Pet. App. at 16a.

[38] *Id.* at 1a-2a.

[39] *Id.* at 17a-18a.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A writ of certiorari is warranted here because, in extending the protection of absolute immunity from damages to respondents' actions, and denying Linne even an opportunity to seek a declaratory judgment, the Court of Appeals has "decided a federal question in a way that conflicts with applicable decisions of this Court", "has rendered a decision in conflict with the decision[s] of [ ]other United States court[s] of appeals on the same matter", and "has decided an important question of federal law which has not been, but should be, settled by this Court".[40] Five issues are involved:

First, even if Rideoutte as a witness has absolute immunity from a civil claim based on his perjury, and the other respondents as prosecutors have absolute immunity for their obstruction of justice before the Grand Jury, suppression of the Rideoutte Report, and subornation of Rideoutte's perjury before and during Linne's criminal trial, nevertheless Rideoutte himself lacks absolute immunity for his participation in the conspiracy to obstruct justice and suppress exculpatory evidence other than by his own perjured testimony. For in that aspect of the conspiracy he was neither a witness nor a prosecutor; and the prosecutors' own immunity (if any) does not embrace him.

Second, neither Rideoutte nor any other respondent has absolute immunity for participation in the *post*-criminal-trial cover-up — because none was acting as a witness; Rideoutte was not acting as a prosecutor; and the other respondents were acting in their administrative, not prosecutorial, capacities when they deceived their superiors and other governmental officials about the conspiracy.

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[40] Rule of the Supreme Court of the United States 10.1(c), 10.1(a), and 10.1(c).

Third, even if Rideoutte and the other respondents have absolute immunity from *damages* for their wrongdoing, they should be subject to *declaratory* and *injunctive* relief.

Fourth, even if all respondents have absolute immunity for their perjury and subornation of perjury, suppression of exculpatory evidence, and so on before and during the criminal trial, they lack such immunity for their *conspiracy* to commit those acts.

And fifth, even if all respondents have absolute immunity to claims under *Bivens* and *Carey*, they have no such immunity under RICO.

I. Rideoutte lacks absolute immunity both for his knowing participation in respondents' wrongdoing other than as a witness, and for his failure to expose that wrongdoing.

First, it may be that Blondin, Conroy, Krysa, and Rosen have absolute immunity for wrongdoing they perpetrated *qua prosecutors*, and Rideoutte has absolute immunity for wrongdoing he perpetrated *qua witness*, at the criminal trial. Nevertheless, Rideoutte lacks absolute immunity for all the actions he took, as neither a witness nor a prosecutor but in criminal league with the other respondents, that aided and abetted them in their suppression of exculpatory evidence, obstruction of justice, mail fraud, perjury and subornation of perjury by witnesses other than Rideoutte, and other illegal acts.[41] In ruling otherwise, the Court of Appeals wildly overextended absolute immunity to protect, not only individuals who can arguably claim it for themselves as a consequence of their own legitimate, official status as prosecutors, but also an individual with no personal, official claim to

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[41] *Compare* Complaint ¶¶ 49-52, 69, and 70 *with* Dennis v. Sparks, 449 U.S. 24, 27-32 (1980). *See also* Gebardi v. United States, 287 U.S. 112, 120-21 (1932); Brummett v. Camble, 946 F.2d 1178, 1184-85 (5th Cir. 1991); Strength v. Hubert, 854 F.2d 421, 423 n.1, 425-26 (11th Cir. 1988).

such immunity who receives it only as a consequence of his knowing and willful conspiratorial involvement in the prosecutors' *illegal* activity!

Second, even if Rideoutte has absolute immunity for his perjured testimony as a witness at the criminal trial, and could show that he was not acting in corrupt concert with the other respondents, nevertheless he lacks absolute immunity for his nontestimonial acts and omissions that helped to make successful and cover up the bad-faith prosecution of Linne.[42]

The Court of Appeals' contrary decision, besides being plainly wrong on the legal merits, is palpably dangerous as a matter of public policy. For it greatly expands the ability of prosecutors to

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[42] *Compare* Complaint ¶¶ 57-60 *with* Dellums v. Powell, 660 F.2d 802, 807-08 (D.C. Cir. 1981); Strength v. Hubert, 854 F.2d 421, 423 n.1, 425-26 (11th Cir. 1988); *and* White v. Frank, 855 F.2d 956, 958-62 (2d Cir. 1988). *See also* Kulwicki v. Dawson, 969 F.2d 1545, 1467 (3rd Cir. 1992)(although non-prosecutor witness is entitled to absolute immunity with respect to actual testimony at trial, he lacks such immunity for submission of false evidence outside of trial). *Cf. also* Joseph v. Patterson, 795 F.2d 549, 560 (6th Cir. 1986)(persons carrying out "investigatory functions of the prosecutor" have only qualified immunity). On Rideoutte's lack of even qualified immunity, *see* Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988).

For example, as the author of the Rideoutte Report, Rideoutte knew that Linne had not "established" and "operated" the Bullion Fund (and, indeed, had no official connexion with it). Yet, as a governmental investigator, he did nothing: (i) to inform the Grand Jury as to the falsity of the allegations on that score in the indictment before the criminal trial; (ii) to report what had happened during that trial to his superiors in the IRS, to honest officials in the Department of Justice, or to the courts; or (iii) to give belated evidence after the fraud was made glaringly apparent in the Fourth Circuit Court of Appeals and the proceedings underlying this petition. Indeed, to this very day he maintains a complete, and guilty, silence.

recruit non-prosecutorial official and lay henchmen into conspiracies to deprive criminal defendants of constitutional rights. If allowed to stand, the decision will protect — and thereby rationalize as *de facto* "legitimate", encourage, and facilitate — such conspiracies, by rendering them costless to the henchmen, as well as the prosecutors, even if (as in this case) the henchmen are fully exposed. Moreover, the Court of Appeals' decision is subversive of general honesty in governmental service, because it also protects — and thereby promotes — refusals by otherwise innocent officials to expose conspiracies among their fellow governmental employees to deny citizens their constitutional rights.

II. Respondents lack absolute immunity for their participation in the cover-up.

All respondents lack absolute immunity to the claim against their *post*-criminal-trial cover-up,[43] because they were acting in the capacities neither of prosecutors (Blondin, Conroy, Krysa, and Rosen)[44] nor of a witness (Rideoutte) in "deceiv[ing] their past and present superiors in the governmental chain of command",

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[43] Complaint ¶¶ 53-56. In terms both of time and the number of governmental agencies and offices involved, the cover-up has been extensive. *See* Affidavit of Edwin Vieira, Jr., In Support of Plaintiffs' Motion for a Continuance Under Federal Rule of Civil Procedure 56(f), Linne v. Rideoutte, Civil Action No. 89-1005 TFH (D.D.C.).

[44] Burns v. Reed, 111 S. Ct. 1934 (1991); Gray v. Bell, 712 F.2d 490, 498-500 (D.C. Cir. 1983)(absolute prosecutorial immunity applies only to participation in the judicial phase of the criminal process). *See* Ryland v. Shapiro, 708 F.2d 967, 975-76 (5th Cir. 1983): "We hold that the alleged actions of the defendants in falsifying the death certificate and in covering up the murder, if proven, were actions performed outside their role as prosecutors. * * * Characterizing these actions as akin to those traditionally undertaken by officers of the court (which would entitle them to absolute immunity) would make a mockery of the judicial system."

as Linne alleges.[45] Indeed, respondents lack even a colorable defense of qualified immunity to this claim.[46]

Moreover, besides being plainly wrong on the legal merits, the Court of Appeals' decision subverts any rational policy of governmental accountability and exacerbates the danger from prosecutorial conspiracies, by licensing the perpetrators and their henchmen, hangers-on, fellow travellors, and sympathizers to cover up and thereby perpetuate the wrongdoing therafter.

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[45] Even if Krysa and Rosen were not original members of the conspiracy, but merely failed to discipline or turn in Blondin, Conroy, and Rideoutte after Linne discovered the Rideoutte Report, they (Krysa and Rosen) are still liable. *See, e.g.,* McClelland v. Facteau, 610 F.2d 693, 697-98 (10th Cir. 1980)(civil-rights action allowed against official who, although on notice of misconduct of subordinates, failed to correct it); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976)(civil-rights action allowed where officials failed to discipline subordinates "whose recent culpable conduct had been brought to their attention"); Kellerman v. Askew, 541 F.2d 1089, 1091-92 (5th Cir. 1976)(officials' failure to act and acquiescence in illegal acts of subordinates actionable); Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978). "Guilty knowledge may be inferred where instances of fraud are repeatedly brought to a defendant's attention without prompting alteration of his facilitative conduct." United States v. Nivica, 887 F.2d 1110, 1114 (1st Cir. 1989).

[46] *See* Briggs v. Goodwin, 698 F.2d 486, 491-93 (D.C. Cir. 1983) (good-faith-immunity defense negated where prosecutor knew or should have known statement to judge "was either false or had been misleading", and where he failed "to correct or clarify his statement for those that it had misled").

III. Appeal or collateral review of Linne's criminal case is irrelevant to his right to maintain this civil action.

The Court of Appeals' affirmance of the District Court's denial of declaratory relief merely adds Kafka-esque insult to injury by saying that "[t]he proper vehicles for [Linne's] challenge to the truthfulness of the government's evidence supporting [his] conviction[ ] are direct appeal and collateral review of th[e] conviction[ ]".[47]

First, this apology for judicial inaction forgets that a civil-rights claim is *separate* from an appeal of or collateral attack on a criminal conviction.[48]

Second, regarding suppression of the Rideoutte Report, the Court of Appeals for the Fourth Circuit in the criminal case has already ruled that the exculpatory evidence therein on the Bullion Fund "was *not material to* the question of [Linne's] intent to defraud".[49] Therefore, the court did not pass on the "truthfulness" *vel non* of that evidence. Collateral review would do no more.[50]

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[47] Pet. App. at 2a.

[48] *See, e.g.,* Smith v. Springer, 859 F.2d 31 (7th Cir. 1988), *and compare with* Briggs v. Goodwin, 698 F.2d 486, 497 (D.C. Cir. 1983); Haring v. Prosise, 462 U.S. 306 (1983); *and* Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974).

[49] United States v. Linne, Nos. 86-5018L, 86-5019, 86-5020, & 86-6782 (4th Cir.), Unpublished Slip Op. at 7-8 (emphasis supplied), *attached as* Exhibit B to Appellees' Motion for Summary Affirmance, Linne v. Rideoutte, No. 91-5338 (D.C. Cir.).

[50] *See* Briggs v. Goodwin, 698 F.2d 486, 497 (D.C. Cir. 1983): "Appellate review of convictions provides no relief for those who would have been convicted in spite of the [constitutional] violation[s alleged]." One may rightfully shake his head in disbelieving astonishment at the

Third, regarding obstruction of justice in the Grand Jury in connexion with the false allegations concerning the Bullion Fund, the Fourth Circuit refused to allow Linne to raise the issue on appeal after disclosure of the Rideoutte Report exposed Grand-Jury tampering.[51]

And fourth, respondents' cover-up is still on-going, *long after and independently of* the criminal trial, and therefore could and can not possibly be the subject of the criminal appeal or of any collateral review of Linne's conviction.

But the short answer to the Court of Appeals' theory is that, were appeal "[t]he proper vehicle[]" — that is, the *only way* — to address abridgment of a defendant's civil rights in a criminal proceeding, then *Pulliam* v. *Allen*[52] and *Haring* v. *Prosise*[53] were wrongly decided as a matter of general principle. If so, that

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Fourth Circuit's dismissal as "*im*material" to Linne's conviction of the Rideoutte Report, its suppression, Rideoutte's perjury, and the prosecutors' explicit reliance on that false testimony. But given that result, perverse as it may be, the District of Columbia Circuit was clearly wrong to rule that the criminal appeal was Linne's sole recourse to challenge respondents' wrongdoing. If, as the Fourth Circuit implicitly ruled, the complex of wrongdoing connected with the Rideoutte Report was mere "harmless error", the untruthfulness of Rideoutte's testimony was irrelevant to the conviction — and therefore not subject to correction on appeal.

[51] Order of 20 July 1987, United States v. Linne, Nos. 86-5018L, 86-5019, 86-5020, & 86-6782 (4th Cir.).

[52] 466 U.S. 522 (1984). *Compare id.* at 542 & n.22 (opinion of the Court) *with id.* at 553-54 & nn.13-14 (Powell, J., dissenting).

[53] 462 U.S. 306 (1983).

conclusion is not for a Court of Appeals to draw *sub silentio*,[54] but for this Court to rule explicitly.

Moreover, the Court of Appeals' decision cynically eviscerates Linne's only remaining constitutional right in the premises. When unscrupulous prosecutors and malignant government witnesses secrete exculpatory evidence from and present perjured testimony to a petit jury, they deny the defendant his *absolute* right to procedural due process with respect to honest and accurate fact-finding.[55] Even if suppressed facts and articulated lies are uncovered (as here) *post*-trial but *pre*-appeal, under the Court of Appeals' rule a defendant is entitled to no meaningful relief. For if (as here) the appeals court in the criminal appeal finds the hidden evidence or tainted testimony "*not* material", it affirms the conviction *without passing on the truth of the evidence or the falsity of the testimony*; and the defendant obtains no succor there as to that issue. Then, other courts dismiss the defendant's later civil suit, on the impossible ground that relief should have been sought in the criminal appeal or some collateral proceeding. Thus, when the "absolute" nature of procedural due process is most important — namely, when a defendant seeks a judicial determination of a factual issue crucial to him but "not material" to his conviction — , the defendant finds illusory his "right" to have the truth openly declared, because that theoretical "right" lacks a real-world remedy. His "absolute" right to procedural due process becomes, in practical effect, an *absent*, *empty*, and *delusive* "right" fit more for the Potemkin-village "bill of rights" of some now-defunct communist "people's republic" than for the judicial gloss on the Constitution of the United States!

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[54] The Court of Appeals — Linne is tempted to say "of course" — fails even to cite *Pulliam* or *Haring*, let alone to attempt to explain those decisions away.

[55] Carey v. Piphus, 435 U.S. 247, 266 (1978)("absolute" in that it does not depend on the ultimate determination of the defendant's guilt or innocence).

IV. Absolute immunity should not extend to officials' conspiracies to deny constitutional rights.

All respondents lack absolute immunity for their *extra*-judicial *conspiracy* to "frame" Linne as the purported mastermind of the Bullion Fund, whatever their arguable immunities for purely *individual* wrongdoing as prosecutors or witness before the Grand and Petit Juries and the District Court in Linne's criminal case.[56] Linne concedes that decisions of some Circuit Courts are *contra*.[57] However, this clear split among the the Circuit Courts on the question *supports* issuance of a writ of certiorari.

Moreover, this Court has never addressed whether the absolute immunity of individuals acting as prosecutors and witnesses extends to *extra*-judicial conspiratorial conduct of the type evidenced here.

V. Absolute immunity should not extend to officials' conspiracies to violate RICO.

Finally, the situation this case presents raises important issues as to the application of RICO.

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[56] San Filippo v. United States Trust Co. of New York, Inc., 737 F.2d 246, 254-55 (2d Cir. 1984); Malachowski v. City of Keene, 787 F.2d 704, 711 (1st Cir. 1986).

[57] *E.g.,* Ashelman v. Pope, 793 F.2d 1072, 1074-78 (9th Cir. 1986); Dykes v. Hosemann, 776 F.2d 943, 946 (11th Cir. 1985); Holloway v. Walker, 765 F.2d 517, 522-23 (5th Cir. 1985); and Martin v. Malhoyt, 830 F.2d 237, 258 n.57 (D.C. Cir. 1987), *cited by the Court of Appeals in* Pet. App. at 1a. On the merits, Linne asserts that these decisions are poorly reasoned in comparison to *San Filippo*.

No question exists that a federal official can be a "person" under civil RICO,[58] and that a governmental agency can be a RICO "enterprise".[59] Moreover, an attorney can be held liable as a RICO conspirator for knowingly counseling his clients to violate the law, as well as actively aiding them in ways not involving legal advice.[60] This justifies application of RICO to federal prosecutors who misuse their offices to persecute citizens such as Linne. And no absolute immunity for prosecutors and witnesses should be read into civil RICO, on both principle and precedent.

First, absolute immunity is inconsistent with the set of "predicate acts" defined in RICO that are peculiarly easy and likely for corrupt or over-reaching prosecutors to commit.[61] This is true not only in the general case, but especially under the circumstances here. For the Court of Appeals' theory of absolute immunity for Rideoutte's participaton in the conspiracy other than as a witness would enable a lay gangster, who conspired with a corrupt prosecutor to obstruct justice and suborn perjury, to claim "absolute immunity" derivative of the prosecutor's immunity. Surely, Congress never intended such a perverse situation to obtain.

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[58] 18 U.S.C. § 1961(3) ("person" includes "*any* individual").

[59] *See* 18 U.S.C. § 1961(4). *Compare* United States v. Angelilli, 660 F.2d 23, 30-35 (2d Cir. 1981); United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981); United States v. Clark, 646 F.2d 1259, 1261-67 (8th Cir. 1981); *and* United States v. Altomari, 625 F.2d 5, 7-8 (4th Cir. 1980)(office of public prosecutor), *with* Complaint ¶¶ 66-68. These criminal RICO cases are precedents for civil RICO liitgation. *E.g.*, Eaby v. Richmond, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983).

[60] United States v. Loften, 518 F. Supp. 839, 854-56 (S.D.N.Y. 1981).

[61] *See* 18 U.S.C. § 1961(1)(B), *citing* 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), and 1503 (obstruction of justice).

Second, at least one court has presumed actionable a conspiracy to commit perjury implemented by mail fraud, in the face of a defense of absolute immunity for witnesses.[62] The Court of Appeals' analogy to absolute immunity for legislators under RICO[63] is inapt, for two reasons: (i) Legislative immunity traditionally rests on a *constitutional* basis;[64] whereas, immunities for witnesses, prosecutors, and executive officials are generally judicial creations arising out of "public policy" where legislative intent does not preclude such immunities. So, that absolute immunity for legislators may be appropriate under RICO does not compel the conclusion that equivalent immunity for witnesses and prosecutors is also warranted. And (ii) legislators acting under color of their offices are most unlikely to become involved in the RICO "predicate acts" that corrupt prosecutors and lying witnesses would commit. So, the statute contains an operational or functional reason for deducing that Congress intended to distinguish between legislators and prosecutors as far as immunity is concerned.

CONCLUSION

This case is a true stinker. When Linne appealed his conviction, the Fourth Circuit told him — not surprisingly, in an *un*published, *per curiam* opinion — that the suppression of the Rideoutte Report and Rideoutte's perjury were "not material", even though the Krysa Letter had revealed that information about the Bullion Fund "enabled us [the prosecutors] to bring [the] indict-

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[62] Sellers v. General Motors Corp., 590 F. Supp. 502, 504-07 (E.D. Pa. 1984)(complaint dismissed because of failure to allege such a conspiracy). *See also* C&W Construction Co. v. Local 745, Carpenters, 678 F. Supp. 1453, 1466-67 (D. Hawaii 1988)(perjury can constitute a RICO "predicate act" through 18 U.S.C. § 1503).

[63] *See* Pet. App. at 1a, *citing* Thillens, Inc. v. Community Currency Exchange Ass'n of Illinois, Inc., 729 F.2d 1128, 1130-31 (7th Cir. 1984).

[64] *E.g.*, U.S. Const. art. I, § 6, cl. 1.

ment",[65] and even though Conroy had lied to the Petit Jury that "Linne demonstrates [his] intent [to defraud] through his promotion of the Bullion Fund".[66] This Court denied certiorari.[67]

Linne sought assistance from the Solicitor General of the United States, from the Attorney General of the United States, from the Office of Professional Responsibility of the Department of Justice, from various other divisions of the Department of Justice, from various divisions of the Internal Revenue Service, and even from legal counsel to then-President Reagan — all without result.[68]

Finally, when Linne brought the civil action underlying this petition, the District of Columbia Circuit told him — again, not surprisingly, in an *un*published, *per curiam* summary affirmance — that respondents have "absolute immunity" even for their illegal actions to which such immunity does not in principle apply, and that he (Linne) should have litigated the Bullion-Fund issue in the criminal appeal, notwithstanding that the Fourth Circuit had already held the issue "not material" to his conviction!

Apparently, the Fourth Circuit and the District of Columbia Circuit are unfamiliar with what Mr. Justice Powell described as "the uniqueness of our Constitution and our system of judicial review: courts at all levels are available and receptive to claims of injustice, large and small, by any and every citizen of this coun-

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[65] PSMF, *ante* note 2, ¶ 14.

[66] *Id.* ¶ 139.

[67] 484 U.S. 1019 (1988).

[68] *See* Affidavit of Edwin Vieira, Jr., In Support of Plaintiffs' Motion for a Continuance Under Federal Rule of Civil Procedure 56(f), Linne v. Rideoutte, Civil Action No. 89-1005 TFH (D.D.C.).

try".[69] But, then, Linne too is unfamiliar with any save the purely theoretical benefits of this "[unique] system of judicial review".

Through the serpentine contortions of the federal criminal-justice system, Linne was "framed" as the purported mastermind of the Bullion Fund, and the "frame" neatly whitewashed. When Linne attempted to seek redress through petitions to executive and administrative agencies, he met "stonewalling" and cover-ups.[70] Finally, Linne took his case to the courts that Americans like to think are "receptive to claims of injustice, large and small, by any and every citizen of this country". He asked for very little in the way of relief: *Not* to overturn his conviction; for that had already been upheld on appeal. *Not* to avoid incarceration, because he has now served his time in prison and on probation. Only to establish the truth about the Bullion Fund, and to obtain a judicial declaration of respondents' wrongdoing on that score. Apparently, however, this was too much to ask from federal courts "receptive to claims of injustice, large and small" in the District of Columbia.

The question nevertheless remains, is it too much to ask from *this* Court? Will *this* Court sanctify the notion that the Rideouttes of this country really have "*absolute* immunity" when they conspire with prosecutors to suppress exculpatory evidence, rig indictments, and then cover up their wrongdoing (even if they are immune with respect to their courtroom perjury)?! Will *this* Court approve the idea that the Blondins, Conroys, Rosens, and Krysas of this country really have "*absolute* immunity" when they cover up each others' illegal activities as simple administrators (even if they are immune with respect to the "frame-ups" they

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[69] Rankin v. McPherson, 107 S. Ct. 2891, 2901 (1987)(concurring opinion).

[70] Perhaps he should not have been surprised, given the present climate of corruption in Washington. *See, e.g.,* Frank, "The INSLAW File", *The Washington Post Magazine* (14 June 1992), at 14.

perpetrate as prosecutors)?! And will *this* Court agree with the Court of Appeals that the answers to these queries are "so clear as to justify summary action" against Linne?[71]

Let this Court's response settle the matter in the only way consistent with American traditions. Let the writ of certiorari issue.

Respectfully submitted,

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(703) 791-6780

Counsel of Record for Petitioners

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[71] Pet. App. at 2a.

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BURTON D. LINNE, JACK O. SLATER,
and JOHN C. IMLAY, IV,

Petitioners,

v.

JAMES T. RIDEOUTTE, JOHN M. CONROY,
THOMAS D. BLONDIN, ROBERT W. ROSEN,
and STANLEY F. KRYSA,

Respondents.

**Petition for a writ of certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5338 **September Term, 1991**
89cv01005

Burton D. Linne, et al.,

Appellants

v.

James T. Rideoutte, et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED JUN 09 1992

CONSTANCE L. DUPRE
Clerk

BEFORE: Wald, Edwards and Williams, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto and the reply, it is

ORDERED that the motion for summary affirmance be granted. The district court correctly determined that appellants' claims for damages are barred by the absolute immunity enjoyed by prosecutors and witnesses. See Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976)(prosecutorial immunity); Gray v. Bell, 712 F.2d 490, 498-506 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984)(same); Briscoe v. LaHue, 460 U.S. 325(1983)(witness immunity); Briggs v. Goodwin, 712 F.2d 1444, 1448-49 (D.C. Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (same). Appellants' allegations of conspiracy do not defeat this immunity. See Martin v. Malhoyt, 830 F.2d 237, 258 n.57 (D.C.Cir 1987). Further, we reject appellants' unsupported assertion that Congress, in enacting 18 U.S.C. § 1964, intended to abrogate existing immunities protecting government officials and witnesses from civil damage claims. Cf. Thillens, Inc. v. Community Currency Exch. Ass'n of Illinois, Inc., 729 F.2d 1128, 1130-31 (7th Cir.) (civil RICO claims

against state legislators barred by absolute immunity), cert. dismissed, 469 U.S. 976 (1984). Finally, the district court properly exercised its discretion, see ACLU Found. of [2] Southern California v. Barr, 952 F.2d 457, 466 (D.C. Cir. 1991), to deny relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. The proper vehicles for appellants' challenge to the truthfulness of the government's evidence supporting their convictions are direct appeal and collateral review of those convictions.

The merits of the parties' positions are so clear as to justify summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C.Cir 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C.Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to withold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BURTON D. LINNE, et al.,	**FILED**
	SEP 06 1991
Plaintiffs	NANCY M. MAYER-WHITTINGTON
	CLERK
v.	
	Civil Action No. 89-1005
JAMES T. RIDEOUTTE,et al.,	
Defendants	

MEMORANDUM OPINION

Plaintiffs Burton D. Linne, Jack O. Slater and John c. Imlay, IV, have filed this suit against five federal officials in their individual capacities. Plaintiffs' allegations revolve around their convictions in United States District Court for the Eastern District of Virginia.[1] Plaintiffs allege that that conviction was part of a conspiracy to deny them their constitutional rights. Specifically, they allege that the "prosecutorial team" conspired against them, and seek a declaratory judgment that the "statements, testimony, and other representations" that the defendants made in the criminal action concerning an entity known as the "Bullion Fund" or the "Bullion Management Corporation" were untrue, false and fraudulent. Complaint ¶ 1. Plaintiffs also seek to enjoin the defendants from making false statements concerning plaintiffs' right to advocate the "Strict Accounting System," a system which distinquishes between Federal Reserve Notes and so-called "constitutional dollars." Finally, plaintiffs seek monetary [2] damages from the defendants, under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

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[1] United States v. Linne, et al., Cr. No. 85-00223-A (E.D. Va. 1985).

Now pending is the Defendants' Motion to Dismiss. In an Order issued December 11, 1990, the Court notified the parties that since matters outside the pleadings had been presented to the Court, the Court would treat defendants' motion as a motion for summary judgment. Also pending is "Plaintiffs' Motion for Interlocutory Summary Judgment on the Issue of Defendants' Liability under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971)." For the reasons set out below, the Court shall grant Defendants' Motion for Summary Judgment.

I. Factual Background

In December, 1985, the three plaintiffs were convicted in the United States District Court for the Eastern District of Virginia of numerous counts of mail fraud, as well as conspiracy in respect to the marketing and promotion of a fraudulent tax scheme called "Citizens for Dollars." This scheme advocated the position that there was a meaningful distinction, for tax purposes, between Federal Reserve Notes and so-called "constitutional dollars."

Shortly before those convictions, the plaintiffs filed suit in this Court seeking a declaratory judgment concerning the validity of the "Strict Accounting System." ("SAS"), and its underlying monetary theories. See Burton Linne, et al. v. James A. Baker, et al. Civil Action No. 85-3713 (D.D.C. 1985). In a [3] Memorandum Opinion and Order, issued April 15, 1986, this Court dismissed the plaintiffs' complaint, stating that plaintiffs' "search for the ultimate tax loophole will not cease, but to the extent it relies upon this action, it must come to a halt." In a June 3, 1986 Memorandum Opinion and Order, the Court awarded attorney's fees against the plaintiffs in that action, finding their arguments to be "ludicrous," "unwarranted by existing law," and "wholly devoid of merit."

On April 12, 1989, the plaintiffs filed the complaint in the above-captioned case, again seeking a declaratory judgment con-

cerning the validity of SAS and a declaration that they had not been involved in establishing the "Bullion Fund," an entity the government argued, at the criminal trial, was a mail-drop serving as an entity for money-laundering in the Bahamas. In this case, however, plaintiffs have sued different Government officials and also seek monetary damages from these defendants in their individual capacities. In this case, plaintiffs names as defendants the prosecutorial team that represented the United States in the earlier criminal case. They seek a declaratory judgment that the defendants made false statements in the criminal prosecution. Specifically, plaintiffs allege the defendants made false statments "concerning the alleged role of plaintiffs in establishing an entity known as the "Bullion Fund" . . . and using that entity as a "mail drop" . . . in connection with plaintiffs' former business "Citizens for Dollars" (CFD). Plaintiffs also seek to prevent defendants from making any [4] further allegedly false statements concerning plaintiffs' right to advocate the SAS.

II. Discussion

While the plaintiffs attempt to frame their complaint as a civil rights action separate from both their criminal convictions and the case earlier before this Court in which the Court not only rejected plaintiffs' claims as "ludicrous" but also awarded attorneys' fees against them, the Court recognizes the complaint for what it really is. In filing this complaint, the plaintiffs seek to collaterally attack their criminal convictions by obtaining declaratory relief finding that the defendants, inter alia, withheld evidence and perjured themselves during the plaintiffs' trial. Second, plaintiffs seek to validate their tax scheme by obtaining an injunction prohibiting future prosecution of the plaintiffs based on their monetary "theories," notwithstanding this Court's earlier dismissal of a similar case. Finally, plaintiffs seek to collect monetary damages from the government agents who prosecuted them, by alleging violations of their constitutional rights and by alleging violations of RICO.

A. Failure to State a Bivens Claim

(1) Heightened Pleading Standard

The Supreme Court held in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), that a federal official may be held liable individually for violations of a plaintiff's constitutional rights while acting in his or [5] her official capacity. A proper Bivens claim, however, must allege a specific constitutional deprivation caused by the particularized acts of each individual defendant. Failure to allege a specific, factually detailed violation deprives the Court of subject matter jurisdiction and fails to state a claim for which relief may be granted. If the complaint fails to allege specific, factually detailed violations, the complaint must be dismissed. See Baker v. McCollan, 443 U.S. 137, 140 (1979); Davis v. Passman, 442 U.S. 228, 248 (1979).

The D.C. Circuit has repeatedly explained that Bivens plaintiffs are held to a "heightened pleading standard" which requires plaintiffs "at the very least [to] specify the 'clearly established' rights they allege to have been violated with . . . precis[ion]." Martin v. Malhoyt, 830 F.2d 237, 254 (D.C. Cir. 1987) (quoting Smith v. Nixon, 807 F.2d 197, 200 (D.C. Cir 1986) and Hobson v. Wilson, 737 F.2d 1,29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985)). See also Hunter v. District of Columbia, No. 88-7265 (D.C. Cir. Aug. 30, 1991), slip op. at 9. This heightened pleading standard essentially requires the complaint to allege, with specificity, "who did what to whom and why." Dewey v. University of New Hampshire, 694 F.2d 1,3 (1st Cir. 1982), cert. denied, 461 U.S. 944 (1983).

With these standards in mind, the Court examines the plaintiffs' complaint. Plaintiffs allege that their rights guaranteed by the First, Fifth, Sixth, Seventh and Ninth Amendments have been violated. They also allege that there have [6] been violations of RICO. The plaintiffs allege that they fear that the defendants are engaged in a conspiracy to deny them their constitutional rights to "publicize SAS and to advocate its adoption by the general public" in violation of their First, Fifth, Sixth, Seventh and Ninth Amendment rights. Complaint at ¶ 24.

They allege that they "have been the victims of politically motivated, retaliatory and bad faith prosecutions in the United States District Court for the Eastern District of Virginia,"[2] and that the defendants "will attempt to rely on these prosecutions as relevant 'precedents' and 'authorities' against plaintiffs' publication, advocacy, and implementation of any SAS-type program or organization. . . ." Complaint at ¶ 23. Thus, plaintiffs allege that their "present situation is one of immediate and on-going controversy, uncertainty, insecurity, fear, anxiety and chilling of their First, Fifth, and Ninth Amendment and other fundamental Constitutional rights." Complaint at ¶ 24.

These allegations stand as the only "factual" allegations which could form the basis of the plaintiffs' Bivens claim. These allegations simply do not meet the "heightened pleading" requirement of a Bivens action. The Complaint fails to state, with any specificity, "who did what to whom and why." Dewey, 649 F.2d at 3. As this Court held over five years ago, the allegations simply did not state a "justiciable controversy." [7] April 15,1986, Memorandum Opinion and Order at 5-6. While the plaintiffs allege a series of facts concerning defendants' involvement in obtaining an indictment of the plaintiffs and in securing their subsequent convictions, these actions are protected by absolute immunity. As for actions which the defendants will allegedly take in the future, the plaintiffs have been unable to state with any degree of specificity the basis for their fear of prosecution and how the defendants play a role in any impending prosecution.

As for the plaintiffs' conclusory conspiracy claim, allegations of conspiracy "are insufficient unless amplified by specific instances of misconduct." Lombard v. United States, 530 F. Supp. 918, 923 (D.D.C.), aff'd, 690 F.2d 215 (D.C. Cir 1982), cert denied, 462 U.S. 1118 (1983). The D.C. Circuit has addressed this heightened pleading standard in the context of a conspiracy allegation:

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[2] Complaint at ¶ 23.

> [u]nsupported factual allegations which fail to specify in detail the factual basis necessary to enable [defendants] to intelligently prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive [plaintiffs] of their constitutional rights.

Martin v. Malhoyt, 830 F.2d at 258,, quoting Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

The plaintiffs fail to allege any specific acts which could give rise to a claim of conspiracy. Further, even if the plaintiffs did allege specific facts giving rise to the conspiracy theory, the actions of the defendants would be [8] protected by absolute immunity.[3] Accordingly, the Court must dismiss the plaintiffs' Bivens claim.

(2) Violation of Constitutional Rights

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[3] Plaintiffs contend that the alleged conspiratorial actions of the defendants were extra-judicial and, therefore, not subject to absolute immunity. They cite the Supreme Court's opinion in Burns v. Reed, 111 S.Ct. 1934 (1991), for the proposition that a prosecutor only enjoys qualified immunity, and not absolute immunity, in respect to giving improper legal advice to the police in the investigative phase of a criminal case, because this action was not part of the prosecutor's role in the judicial proceedings. While this distinction between absolute and qualified immunity may be true, it simply does not apply to the facts as alleged by the plaintiffs. The Court in Burns expressly approved of its prior ruling in Imbler v. Pachtman, 424 U.S. 409 (1976), in which the Court recognized that the prosecutor enjoyed absolute immunity even when there were allegations that the prosecutor knowingly used false testimony at trial. Burns 111 S. Ct. at 1939 (citing Imbler, 424 U.S. at 430.) Plaintiffs' allegations are much more akin to those found in Imbler than those found in Burns and, therefore, the Court finds that the members of the prosecution team in this case still enjoy absolute immunity.

Even if the plaintiffs had met the heightened pleading standard required for Bivens actions, they must properly allege a violation of a constitutional right. In this case, the plaintiffs have failed to allege a violation of a constitutional right.

A basic requirement for a Bivens claim is that the plaintiffs must properly allege that a constitutional right has been violated. To meet this requirement, plaintiffs in the case at hand allege that because of their vocal advocacy of SAS, they have been and will be targeted for more aggressive investigation and prosecution in violation of the First Amendment.

[9] As this Court observed in its April 15, 1986 Memorandum Opinion dismissing plaintiffs' earlier complaint for declaratory judgment, "[th]he power to declare what is and what is not 'legal tender' lies with Congress and not the Courts." April 15, 1986 Memorandum Opinion at 6-7. Claims premised upon theories similar to the plaintiffs have been resoundingly rejected by reviewing courts. See Foret v. Wilson, 725 F.2d 254 (5th Cir. 1984); Jones v. Commissioner, 688 F.2d 17 (6th Cir. 1982). By seeking injunctive relief in this case, plaintiffs are seeking a declaration as to the validity of their monetary standard. As this Court has noted before, this is not within the Court's power.

Further, claims of First Amendment violations by convicted or incarcerated "tax protesters" have been uniformly rejected by the federal courts:

> The claim of First Amendment protection of [Kelley's] speech is frivolous. His was no abstract criticism of income tax laws. His listeners were not urged to seek congressional action to exempt wages from income taxation. Instead they were urged to file false returns, with every expectation that the advice would be heeded.

United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (upholding conviction of organizer and leader of Constitutional Tax Association). In White v. Elrod, 816 F. 2d 1172 (7th Cir.), cert denied, 108 S. Ct. 286 (1987), the Seventh Circuit held:

> [A] law violator cannot buy immunity from prosecution by coupling his violation with advocacy and then complaining that his advocacy lead the government to single him out to prosecute for the violation -- even if his speculation about the government's motive is true. The government is allowed [10] to get a bigger bang for its buck by concentrating its limited resources on those who flaunt their offenses, since proceedings against them are apt to generate more publicity and therefore communicate a more effective deterrent than proceedings against the obscure and denying violator.

Id. at 1176.

Plaintiffs have failed to allege any violation of the First Amendment since the right to speak of the monetary policy has already been curbed by the Court in Virginia. Therefore, even if their allegations concerning alleged First Amendment violations by the defendants were sufficiently particularized to meet the heightened pleading standard of Bivens, plaintiffs have failed to show that their First Amendment rights were violated in the past or may be violated in the future since plaintiffs' convictions stand as proof that their advocacy of SAS is not protected conduct. Accordingly, plaintiffs may not circumvent the mechanism by which they may appeal their criminal conviction by bringing an identical claim across the river.

B. Failure to State a RICO Claim

RICO was designed to attack "racketeering activity" defined as, inter alia, "any act which is indictable" under enumerated provisions of the Criminal Code. 18 U.S.C. sec. 1961(1)(B); Long Distance Service v. Telecommunications Corp., 692 F. Supp. 1402, 1403 (D.D.C. 1988). Plaintiffs' complaint seems to allege that defendants violated 18 U.S.C. § 1962(c) in some manner. That section provides:

> it shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or partici-

> pate, directly or indirectly, in the conduct of [11] such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[4]

Accordingly, in order to plead a violation of § 1962(c), plaintiffs must allege four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. Sedima S.P.R.L. v. Imrex, co., 473 U.S. 479, 496 (1985).

Again, plaintiffs' complaint is defective because it fails to allege specific acts taken by the defendeants which would constitute racketeering activity. RICO defines "a pattern of racketeering activity" as

> requir[ing] at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity

18 U.S.C. § 1961(5). In determining whether a pattern of activity has been established, the D.C. Circuit has looked to the definition of pattern provided in 18 U.S.C. § 3575(e):

> [c]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants,

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[4] The complaint also alleges violations of §§ 1962(a) and 1962(d). Subsection (a) makes it unlawful "for any person who has received any income from a pattern of racketeering activity . . . to use or invest . . . such income" to acquire or establish "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." The plaintiffs' complaint does not allege that any of the individual defendants received any income, much less that they invested it in any enterprise. Subsection (d) provides for liability for conspiring to violate subsections (a) or (c). It contains no substantive requirements and, therefore depends on proof under subsection (a). Accordingly, the complaint fails to state a violation of section 1962(a) and 1962(d).

> victims, or methods of commission, or otherwise are interrelated by distinquishing characteristics and are not isolated events.

[12] Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782 (D.C. Cir.1988).

The Court finds that the plaintiffs have alleged as many particularized facts in support of their RICO claim as they alleged in support of their constitutional claims. In short, the plaintiffs have failed to allege that any of the defendants engaged in any specific acts which would constitute even a single act of racketeering activity, let alone a pattern of racketeering activity.

C. Absolute Immunity for Prosecutors

At all times relevant to this action, defendants Conroy, Blondin and Rosen were employed as criminal prosecutors within the United States Department of Justice. Defendant Krysa is employed as the Chief of the Criminal Enforcement Section of the Tax Division of the Department of Justice. Each of these defendants was a prosecutor involved in the criminal action against the plaintiffs, brought in 1985 in the United States District Court for the Eastern District of Virginia. Plaintiffs allege that allegedly untrue statements made by defendants Rideoutte, Conroy, Blondin and Krysa "played a decisive role in the indictment and convictions of plaintiffs in United States v. Linne, Cr. No. 85-00223-A (E.D. Va 1985)." Complaint ¶ 21a.

As prosecutors, each is absolutely immune from a civil suit by plaintiffs concerning that prosecution. In Imbler v. Pachtman, 424 U.S. 409, 420 (1976), the United States Supreme [13] Court held that absolute immunity barred a claim of constitutional violations against a prosecutor:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harrassment by un-

> founded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Id. at 422-23.

The immunity extends to any activities of a prosecutor that are "intimately associated with the judicial phase of the criminal process." Id. at 430. This includes "initiating a prosecution" and presenting the . . . case." Id. at 431. The prosecutorial immunity has been applied to numerous aspects of the criminal process and the courts are in general agreement that "policy considerations favor a liberal application of immunity" where even quasi-judicial functions are involved. Ashelman v. Pope, 793.F.2d 1072, 1078 (9th Cir. 1986) (en banc).[5]

Accordingly, to the extent that the plaintiffs seek any monetary damages from defendants Conroy, Blondin, Rosen and Krysa as a result of any actions the defendants took in regard to the criminal prosecution of plaintiffs in 1985 and any subsequent proceedings relating to that prosecution, the claims must be dismissed since these defendants enjoy absolute prosecutorial immunity.

[14] D. Absolute Immunity for Witnesses.

A recurring theme in the plaintiffs' complaint is an effort to undermine their criminal convictions. Instead of, or possibly in addition to, raising issues of false testimony on appeal, plaintiffs seek to bring independent actions challenging the testimony offered in their criminal trials. In furtherance of this effort, plaintiffs claim that defendant Rideoutte gave false testimony at their criminal trial and at prior grand jury proceedings.

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[5] The Court has already dealt extensively with plaintiffs' references to Burns v. Reed, 111 S.Ct. 1934 (1991). See Note 3.

Any claims against defendant Rideoutte concerning his testimony at the criminal trial must be dismissed since it is clear that witnesses in judicial proceedings are immune from civil liability. See Briscoe v. LaHue, 460 U.S. 325 (1983) (absolute immunity extended to police officers who testified at criminal trials; Briggs v. Goodwin, 712 F.2d 1444 (D.C. Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (absolute immunity extended in Bivens suit to prosecutors who testified at pretrial hearings in a criminal case).

E. Declaratory Relief Concerning the "Bullion Fund"

Plaintiffs seek to have this Court declare that they took no part in the establishment and operation of the "Bullion Fund," a criminal money-laundering scheme in the Bahamas. This is not a matter properly before the Court. Plaintiffs, if they wish to [15] vindicate their names in regard to establishment to the Bullion Fund, should have done so in an appeal.[6]

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[6] In a supplemental pleading with the Court, plaintiffs state that the government has filed, in an allegedly related prosecution, United States v. Robinson, Criminal No. 850223-A (E.D. Va.), a "Notice of Government's Proposed Redacted Indictment" which allegedly redacts from the indictment almost all references to the Bullion Fund. The government explained that the redactions were intended to minimize jury confusion by striking out overt acts which the government may not be able to prove. The government proposed to redact the statements that plaintiff Linne "caused to be used and operated The Bullion Fund" and plaintiff Slater "assisted in the formation and operation of the Bullion Fund."

These redactions have no bearing on the plaintiffs' attempt to vindicate their earlier convictions. Further, the redactions are not proof that the plaintiffs had nothing to do with the Bullion Fund, only that the prosecution now does not believe it has sufficient evidence to prove these facts beyond a reasonable doubt. These redactions do not automatically point to the conclusion that the plaintiffs had nothing to do with the Bullion Fund and do not prompt this Court to grant the plain-

III. Conclusion

The plaintiffs have clearly failed to fashion a new cause of action, separate and distinct from the issues already rased in the criminal proceeding in the Eastern District of Virginia or in the case earlier before this Court. Further, the plaintiffs have simply failed to properly state a cause of action under the various theories they advance. Since matters outside the plaintiffs' complaint have been presented to the Court, the Court, having informed the parties that intended to treat the **[16]** government's motion to dismiss as a motion for summary judgment, shall grant the government's motion for summary judgment as to all of the plaintiffs' claims.

/s/
Thomas F. Hogan
United States District Judge

Date: 6th Sept. 1991.

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tiffs such declaratory judgment.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BURTON D. LINNE, et al.,	) **FILED**
	) SEP 06 1991
Plaintiffs	) NANCY M. MAYER-WHITTINGTON
	) CLERK
v.	)
	) Civil Action No. 89-1005
JAMES T. RIDEOUTTE,et al.,	)
	)
Defendants	)

ORDER

In accordance with the Memorandum Opinion issued by the Court in the above-captioned case on September 6, 1991, it is this 6th day of September, 1991, hereby

ORDERED that the Defendants' Motion for Summary Judgment is granted and the above-captioned case shall be dismissed.

/s/
Thomas F. Hogan
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5338 **September Term, 1992**
CV 89-1005

Burton D. Linne, et al.,

Appellants

v.

James T. Rideoutte, et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 16 1992

RON GARVIN
Clerk

BEFORE: Wald, Edwards and Williams, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed July 6, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5338 **September Term, 1992**
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Burton D. Linne, et al.,

Appellants

v.

James T. Rideoutte, et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 16 1992

RON GARVIN
Clerk

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

O R D E R

Appellants' Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

Racketeer Influenced and Corrupt Organizations Act
18 U.S.C. § 1961 *et seq.* (pertinent parts)

§ 1961. Definitions.

As used in this chapter —

(1) "racketeering activity" means * * * (B) any act which is indictable under any of the following provisions of title 18, United States Code: * * * section 1341 (relating to mail fraud), * * * section 1503 (relating to obstruction of justice) * * * ;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity * * * .

§ 1962. Prohibited activities.

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection[ ] * * * (c) of this section.

* * *

§ 1964. Civil remedies.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: * * * imposing reasonable restrictions on the future activities * * * of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce * * * .

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

* * *

§ 1965. Venue and process.

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal

thereof.

* * *

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

* * *

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

No. 92-996

In the Supreme Court of the United States

OCTOBER TERM, 1992

BURTON D. LINNE, ET AL., PETITIONERS

v.

JAMES T. RIDEOUTTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal attorneys and an Internal Revenue Service agent are absolutely immune from petitioners' claims that the attorneys wrongfully prosecuted petitioners and that the agent falsely testified at the criminal trial.

2. Whether petitioners' remaining allegations state a cognizable *Bivens* claim.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

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BURTON D. LINNE, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-2a, is unpublished, but the decision is noted at 971 F.2d 766 (Table). The opinion of the district court, Pet. App. 3a-15a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1992. A petition for rehearing was denied on September 16, 1992. Pet. App. 18a. The petition for a writ of certiorari was filed on December 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Burton D. Linne, Jack O. Slater, and John C. Imlay, IV, were convicted in the United States District Court for the Eastern District of Virginia on various counts of mail fraud, conspiracy to defraud the United States, and (in the case of Linne and Slater) willful failure to file income tax returns. *United States* v. *Linne*, Cr. No. 85-00223-A (E.D. Va. Dec. 20, 1985), aff'd, 826 F.2d 1061 (4th Cir. 1987) (Table), cert. denied, 484 U.S. 1019 (1988). The criminal convictions arose out of petitioners' marketing and promotion of a fraudulent scheme involving financial and accounting practices that, according to petitioners, allowed participating individuals to avoid any obligation to pay federal income tax. Pet. App. 3a-4a.

Petitioners appealed their convictions, arguing that the government had improperly failed to disclose an allegedly exculpatory investigative report—the "Rideoutte report"—prepared by IRS Agent James T. Rideoutte, who testified at petitioners' criminal trial. The court of appeals rejected that argument, holding that: (1) the Rideoutte report was not material to petitioners' intent to defraud or to their willfulness in failing to file federal tax returns; (2) the government had presented at trial "overwhelming evidence, independent of the IRS agent's testimony, from which the jury could find that [petitioners] knew of the unlawfulness of their activities;" and (3) the agent's testimony, which petitioners maintained could have been impeached through the Rideoutte report, was largely collateral to the charges against petitioners. See *United States* v. *Linne*, No. 86-5018(L) (4th Cir.

Aug. 14, 1987), slip op. 7-8 (unpublished) (reproduced in C.A. Mot. for Sum. Affirmance DX B).

2. On April 12, 1989, petitioners filed the instant *Bivens* action against the IRS agent and four federal attorneys involved in the criminal prosecution. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioners' 65-page complaint alleged that the five respondents had withheld evidence and committed perjury during petitioners' criminal trial. Petitioners alleged that respondents' actions violated the First, Fifth, Sixth, Seventh, and Ninth Amendments, as well as provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, and they demanded compensatory and punitive damages. They also sought a declaratory judgment that certain statements, testimony, and other representations were false and fraudulent and an injunction restraining the respondents from making related statements in connection with any prospective criminal, civil, or administrative proceedings. Pet. App. 3a; Compl. ¶¶ 1, 39, 72.

The district court granted summary judgment for respondents. Pet. App. 3a-15a. The court noted that the federal prosecutors were absolutely immune from damage claims based on the prosecutors' actions in initiating a criminal prosecution and presenting the government's case, see *Burns* v. *Reed*, 111 S. Ct. 1934 (1991); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); and the IRS agent was absolutely immune from damage claims based on his testimony at the criminal trial, see *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). See Pet. App. 12a-14a. More fundamentally, the court concluded that petitioners "have failed to allege a

violation of a constitutional right," *id.* at 9a, or a violation of the RICO statute, *id.* at 12a. The court specifically rejected petitioners' argument that the government's criminal prosecution violated the First Amendment. *Id.* at 10a. The court explained that petitioners' convictions "stand as proof" that their advocacy of a fraudulent scheme is not constitutionally protected conduct and that petitioners are not entitled to use a *Bivens* suit, in lieu of the mechanisms available for review of their convictions, to challenge the government's actions at trial. *Ibid.* See also *id.* at 5a, 14a-15a.

3. The court of appeals summarily affirmed the district court's decision, stating that "[t]he merits of the parties' positions are so clear as to justify summary action." Pet. App. 2a. The court agreed that respondents are entitled to absolute immunity with respect to their actions at trial, notwithstanding petitioners' allegations of a conspiracy and violations of the RICO statute. *Id.* at 1a-2a. The court additionally noted that "[t]he proper vehicles for [petitioners'] challenge to the truthfulness of the government's evidence supporting their convictions are direct appeal and collateral review of those convictions." *Id.* at 2a.

ARGUMENT

1. It is well settled that federal attorneys are absolutely immune from a damages suit based on their actions "in initiating a prosecution and in presenting the State's case," *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976), and that federal agents are absolutely immune from a damages suit based on their testimony in a criminal proceeding, *Briscoe* v. *LaHue*, 460 U.S.

325 (1983). Petitioners' submission in this Court appears to acknowledge that respondents are immune from claims premised on the respondents' in-court actions, see Pet. 13-14, and there accordingly is no warrant for review of the court of appeals' decision on that question.

2. Petitioners nevertheless contend that the prosecutors and the IRS agent in this case are subject to suit for participation in an alleged government attempt "to obstruct justice" and to "cover-up" that obstruction. Pet. 13-14; see also Pet. 14-20. That contention is without merit because, even apart from questions of immunity, petitioners' complaint fails to state a cognizable *Bivens* claim.

Petitioners' allegations that the government employees "obstruct[ed] justice" and engaged in a "*post*-criminal-trial cover-up" are premised on petitioners' continuing assertions that the government has suppressed evidence demonstrating petitioners' innocence. See Pet. 13. Specifically, petitioners allege that the Rideoutte report contained exculpatory evidence and that the government was obligated to produce it at trial. See Pet. 14-15 & nn.41-42 (citing Compl. ¶¶ 49-52, 57-60, 69, 70); Pet. 16-17 & nn.43-45 (citing Compl. ¶¶ 53-56). That matter, however, was fully litigated and definitively resolved in the prior criminal proceedings.

The Fourth Circuit held that the Rideoutte report was not material exculpatory evidence, see pp. 2-3, *supra*, and it follows that the government employees' failure to produce that report cannot support petitioners' claim in this *Bivens* action that the employees acted wrongfully. As the court of appeals explained:

> The proper vehicles for [petitioners'] challenge to the truthfulness of the government's evidence supporting their convictions are direct appeal and collateral review of those convictions.

Pet. App. 2a. In this instance, the court of appeals specifically concluded on direct appeal that the Rideoutte report was not material and had no significant impeachment value. *United States* v. *Linne*, No. 86-5018(L) (4th Cir. Aug. 14, 1987), slip op. 7-8 (unpublished). That court's determination is dispositive on the question whether the federal employees acted wrongfully, and it precludes petitioners from relitigating the question in this *Bivens* action—irrespective of the report's "'truthfulness' *vel non*" (Pet. 18). See, *e.g.*, *Allen* v. *McCurry*, 449 U.S. 90 (1980) (Section 1983 plaintiff is collaterally estopped from relitigating issues decided after a full and fair hearing in a state court criminal proceeding).

Petitioner argues (Pet. 14, 19-20) that even if his damage claims cannot go forward, he is entitled to declaratory or injunctive relief. But the preclusive effect of the Fourth Circuit's decision is not limited to a damages remedy. That court's finding that the Rideoutte report was not material exculpatory evidence bars any claim for relief premised on the government's failure to disclose the report at trial. Petitioners' contentions (Pet. 21-23) that the government employees "conspired" to suppress the Rideoutte report and that the alleged "cover-up" violated the RICO statute add nothing substantial to petitioners' case.

The court of appeals concluded that the defects in petitioners' position were "so clear as to justify

summary action." Pet. App. 2a. That court was under no obligation to discuss further petitioners' rambling and diffuse 65-page complaint, which is anything but a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The district court specifically examined petitioners' contention that the government's criminal prosecution violated their rights under the First Amendment and correctly found that contention to be without merit. Pet. App. 8a-10a.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1993

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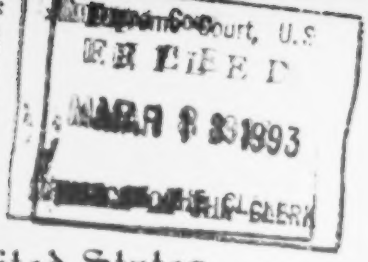
* Because petitioners have failed to state a cognizable *Bivens* claim, no need exists for this Court to hold the petition pending its decisions in *Buckley* v. *Fitzsimmons*, No. 91-7849 (argued Feb. 22, 1993), and *Albright* v. *Oliver*, cert. granted, No. 92-833 (Mar. 1, 1993).



No. 92-996

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BURTON D. LINNE, JACK O. SLATER,
and JOHN C. IMLAY, IV,

Petitioners,

v.

JAMES T. RIDEOUTTE, JOHN M. CONROY,
THOMAS D. BLONDIN, ROBERT W. ROSEN,
and STANLEY F. KRYSA,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners Burton D. Linne *et alia* ("Linne") hereby reply to the Brief for the Respondents in Opposition.

ARGUMENT

Respondents raise two arguments, both of which highlight the need for this Court to issue a writ of certiorari here.

I. Respondents first wrongly contend that Linne's

> submission in this Court appears to acknowledge that respondents are immune from claims premised on the respondents' in-court actions, see Pet. 13-14, and there accordingly is no warrant for review of the court of appeals' decision on that question.[1]

Yet, inconsistently, respondents correctly state that Linne

> sought a declaratory judgment that certain statements, testimony and other representations [of respondents] were false and fraudulent and an injunction restraining the respondents from making related statements in connection with any prospective criminal, civil, or administrative proceedings.[2]

So, there *is* a "warrant for review of the court of appeals' decision on that question", because none of respondents has *any* immunity (absolute or qualified) against declaratory or injunctive relief.[3]

II. Respondents then contend that Linne's

> allegations that [respondents] "obstruct[ed] justice" and engaged in a "*post*-criminal-trial cover up" are premised on [Linne's] continuing assertions that the government has suppressed evidence demonstrating petitioners' innocence. * * * That matter, however, was fully litigated and definitively resolved in the prior criminal proceedings.
>
> The Fourth Circuit held that the Rideoutte report was not material exculpatory evidence, * * * and it follows that

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[1] Brief for the Respondents in Opposition at 5.

[2] *Id.* at 3.

[3] *See* Pulliam v. Allen, 466 U.S. 522 (1984).

> [respondents'] failure to produce that report cannot support [Linne's] claim in this *Bivens* action that [respondents] acted wrongfully.[4]

These contentions are triply wrong.

A. Even respondents do not claim that the Fourth Circuit either found Rideoutte's testimony to be true, or held that the Rideoutte Report did not categorically refute respondents' pretense that Linne had "establish[ed]","formed, directed, and operated * * * the Bullion Fund".[5] Thus, the Fourth Circuit's decision is, by respondents' own tacit concession, irrelevant to Linne's claims for declaratory and injunctive relief.

B. Linne's other claims were ***not*** "fully litigated" in the Fourth Circuit appeal of the criminal convictions.

First, the Fourth Circuit did not even consider, let alone decide, whether respondents' wrongdoing denied Linne his ***absolute*** rights of procedural due process[6] at any stage of the criminal proceedings. *Second,* the Fourth Circuit explicitly refused to entertain as an issue whether the indictment in particular was the product of respondents' fraud.[7] Yet, there can be no question that the Rideoutte Report was withheld from the Grand Jury; that the Grand Jury was deceived into believing that Linne had "establish[ed]","formed, directed, and operated * * * the Bullion Fund";[8] that this deception "enabled us [*i.e.,* respondents] to bring [the] indictment at all";[9] and that, without the indictment, there could have been no criminal trial, no convictions, and no

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[4] Brief for the Respondents in Opposition at 5.

[5] Petition for Certiorari at 3.

[6] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978).

[7] Petition for Certiorari at 7 & n.17.

[8] *Id.* at 3.

[9] *Id.* at 10 & n.29.

appeal to the Fourth Circuit.

C. And Linne's claims were not "definitively resolved" in the Fourth Circuit appeal, either.

First, that (as respondents say) "[t]he Fourth Circuit held that the Rideoutte report was not *material* exculpatory evidence" within the *Brady* rule[10] is irrelevant. For a victim of a prosecutorial conspiracy can suffer loss of his *absolute* rights of procedural due process even if the charges against him are ultimately sustained.[11] Here, the evidence in the Rideoutte Report was plainly exculpatory, even if not "materially" so; for it proved beyond doubt that Linne had ***not*** "establish[ed]","formed, directed, and operated * * * the Bullion Fund", as the deluded Grand Jury falsely alleged in the indictment. Even if respondents had no duty to disclose the Rideoutte Report to Linne under *Brady* or the Jencks Act[12], they had a clear-cut duty *not to lie to the Grand Jury, to Linne's counsel in the criminal trial, to the District Court in the criminal trial, and to the Petit Jury about the matters the report covered.* It passes understanding how the attorneys from the Department of Justice representing respondents could, with straight faces, deny that their clients' web of lies regarding the information in the report did not constitute obstruction of justice, mail fraud, conspiracy to suborn and to commit perjury, perjury, criminal violation of civil rights, *et cetera ad nauseum* simply because respondents may have had no duty to disclose the actual report.

This is particularly true with respect to Rideoutte himself. Being its author, Rideoutte knew what the report contained and that the prosecutors were in possession of it. Aware of the false allegations in the indictment, Rideoutte knew that the prosecutors had suppressed the contents of the report from the Grand Jury. Prepared to commit perjury, Rideoutte knew that the prosecutors had withheld the report from Linne's criminal-defense

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[10] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[11] *See* Carey v. Piphus, 435 U.S. 247 (1978).

[12] 18 U.S.C. § 3500.

attorney, in order to conceal that perjury and make it effective. And, after Linne's discovery of the report, Rideoutte knew that the prosecutors were engaged in a "cover up" to deceive their superiors as to what had transpired. Do counsel for respondents actually expect this Court to accept the notion that Rideoutte had *carte blanche* to participate in or to refuse to expose this conspiracy — much of which involved activities of his *un*related to his appearance as a witness in the criminal trial — simply because the prosecutors were not required, perforce of *Brady* or the Jencks Act, to disgorge the Rideoutte Report?!

No, respondents' argument is arrant nonsense: Even if they had had no obligation under *Brady* or the Jencks Act to disclose the Rideoutte Report, they had a *separate and independent, absolute* duty under the Due Process Clause of the Fifth Amendment not to lie, and lie, and lie about the information contained in the report. That that information was supposedly not "*material* exculpatory evidence" at most goes to the *amount* of damages Linne may recover for respondents' violation of his absolute procedural-due-process rights; it does not relate to their *liability* for violating those rights.

Second, the Fourth Circuit did not "resolve[ ]" in any way, let alone "definitively", whether the Rideoutte Report was in any operative sense not "material" to respondents' obstruction of justice in the Grand Jury. Neither did the Fourth Circuit "resolve[ ]" whether respondents' obstruction of justice in the Grand Jury denied Linne his procedural-due-process rights. And surely respondents cannot argue that this Court should disregard their wrongdoing as "harmless" because of Linne's subsequent conviction. For, just as it would hardly be "harmless" under the Fifth Amendment for prosecutors to obtain a conviction based on an indictment they themselves forged without the participation of a Grand Jury, so too is it the opposite of "harmless" under that Amendment for respondents to have obtained a conviction based on an indictment that would never had been handed down had they not deceived the Grand Jurors as to Linne's controlling role in the Bullion Fund. If, as the Krysa letter admits,[13] the indict-

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[13] Petition for Certiorari at 10.

ment would never have been handed down at all, absent respondents' wrongdoing, Linne's subsequent conviction and its affirmance by the Fourth Circuit are irrelevant to respondents' civil liability for that wrongdoing.

CONCLUSION

This case is a perfect complement to *Buckley* v. *Fitzsimmons* and *Albright* v. *Oliver*.[14] For that reason, this Court should either grant Linne's petition or hold that petition pending its decision in *Buckley*. If the Court chooses to hold the petition, it should allow the parties to file supplementary briefs on the effect

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[14] No. 91-7849 (argued 22 February 1993) and No. 92-833 (certiorari granted 1 March 1993), respectively. In particular, the first question presented in *Buckley* challenges absolute prosecutorial immunity for acts in a *pre*-indictment investigation. Here, Linne challenges absolute prosecutorial immunity for acts in a *post*-criminal-trial "cover up". The second question presented in *Buckley* challenges absolute prosecutorial immunity for false out-of-court statements. Here, Linne challenges the existence of any immunity for respondents, where he seeks a declaration that their previous statements in court about his connexion to the Bullion Fund were knowingly false and an injunction against their repetition of those lies in future official proceedings. And the third question presented in *Buckley* challenges absolute immunity for a witness who conspired with prosecutors to manufacture false inculpatory evidence outside of court. Here, Linne challenges absolute immunity for a witness (Rideoutte) who conspired with the other respondents to secrete exculpatory evidence.

of *Buckley*.

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